UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALLEY HOSPITAL MEDICAL CENTER, INC.,
d/b/a VALLEY HOSPITAL MEDICAL CENTER

Respondent.

And Case No. 28-CA-213783

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS

Charging Party.

RESPONDENT'S BRIEF

COMES NOW Valley Hospital Medical Center, Inc. (Valley Hospital or Hospital), Respondent in the above-styled and numbered matter, and pursuant to § 102.42 of the Board's Rules and Regulations and hereby respectfully submits the following Brief to the Honorable Associate Chief Administrative Law Judge (ALJ) Gerald M. Etchingham in support of its position in this case.

I. STATEMENT OF THE CASE

The Parties herein entered a Stipulation of Facts and submitted a Joint Motion to Submit Case on Stipulation which was granted by the ALJ on August 6, 2018. There are no factual disputes at issue herein.

II. CRITICAL FACTS AND ISSUE PRESENTED

This case involves Respondent's cessation of dues deductions following expiration of the Collective Bargaining Agreement (CBA) between Respondent and Charging Party. The CBA

expired December 31, 2016. (Jt. Stip. Paragraph 10 and Exh. 1.)[1] On January 26, 2018, Respondent notified Charging Party the dues deductions would cease effective February 1, 2018. (Jt. Stip. Paragraph 15 and Exh. 3). On February 1, 2018, Respondent ceased dues deductions. (Jt. Stip. Paragraph 18).

The issue presented is whether Respondent violated the National Labor Relations Act (Act) by ceasing deduction of dues after expiration of the CBA without bargaining with Charging Party in violation of Section 8(a)(1) and 8(a)(5) of the Act.

III. BRIEF HISTORY OF DECISIONS REGARDING ISSUE PRESENTED

The issue presented has been decided three times by the National Labor Relations Board ("NLRB" or "Board"). The Board originally decided whether an employer could cease dues deductions upon expiration of a CBA in *Bethlehem Steel*, 133 NLRB 1347 (1961). In that decision the NLRB unanimously adopted the Trial Examiner's decision and held the employer's cessation of dues was lawful upon expiration of the CBA. In a Supplemental Decision and Order, the popularly cited *Bethlehem Steel*, 136 NLRB 1500 (1962), decision again unanimously held the employer's cessation of dues was lawful upon expiration of the CBA.

In *WKYC-TV*, 359 NLRB 286 (2012), a split Board reversed *Bethlehem Steel* and held an employer's cessation of dues deductions constituted a unilateral change and violated the Act. The *WKYC* decision was rendered void when the Supreme Court issued its decision in *Noel Canning*, 134 S. Ct. 2550 (2014), finding certain Board appointments constitutionally invalid.

The issue was most recently considered in *Lincoln Lutheran*, 362 NLRB No. 188 (2015). In *Lincoln Lutheran*, a majority of the Board overruled *Bethlehem Steel* and held an employer's dues cessation after expiration of a CBA constituted a unilateral change and violated the Act. The

[1] References to the Joint Stipulation will be denoted "Jt. Stip." and references to Exhibits therein will be designated "Exh. __."

majority was made up of Chairman Pearce, and Members Hirozawa and McFerren. Members Miscimarra and Johnson dissented.

On December 1, 2017, the General Counsel (GC) issued Memorandum GC 18-02, which identified a number of cases where the Office of the General Counsel may want to provide the Board with an alternative analysis. The Memo specifically mentioned cases that had overturned precedent and listed *Lincoln Lutheran*. See Memorandum GC-02 at page 4.

IV. ARGUMENT

A. Union Security and Dues Check Off Are Contractually Created and Thus Contractually Expire.

Respondent's position is best stated by the dissent of Members Miscimarra and Johnson in *Lincoln Lutheran*, "In 1962, the Supreme Court endorsed the Board's rule that an employer violates Section 8(a)(5) of the Act by unilaterally changing terms and conditions of employment without first providing the union with notice and an opportunity to bargain, unless the parties have first reached lawful impasse. See *NLRB v. Katz*, 369 U.S. 736 (1962). But the Board has always recognized, as it must, that not all terms and conditions of employment are subject to this rule. Indeed, a month before the Court decided *Katz*, the Board held in *Bethlehem Steel* that a dues-checkoff arrangement was among those exceptions." (citation omitted). *Lincoln Lutheran* at p. 9.

"While binding for the term of the contract that contains it, dues checkoff could lawfully be unilaterally discontinued at contract expiration. For the entire time that the *Katz* rule has been in effect, this principle has been an established part of the collective-bargaining process. The majority today abandons that longstanding precedent and instead subjects dues checkoff, following contract expiration, to the *Katz* rule requiring post contract expiration bargaining over other terms and conditions of employment." "[T]he *Bethlehem Steel* exception is justified by statutory and policy considerations that warrant its continuation, and the primary consequence of this change is

to substantially alter the current balance that exists between the interests of employers and unions upon contract expiration. In our view, this type of change should be the province of the Congress, not the Board."

There is no dispute that during the 50 years that *Bethlehem Steel* was law there was no legislative or regulatory proposal to alter the Board's decision, none. Unions are not without political clout and *Bethlehem* rightfully was accepted as correct law until the *Lincoln* majority decided to shift the balance of power from what was statutorily intended to its political views on unionization and union power.

The *Lincoln Lutheran* dissent continues, "The Board held in *Bethlehem Steel* that a union security clause becomes 'inoperative' upon contract expiration as a matter of law, such that it is not an unfair labor practice for the employer to cease applying it … Similar considerations prevail with respect to the Respondent's refusal to continue to checkoff dues after the end of the contracts," … "The Union's right to such checkoffs in its favor, like its right to the imposition of union security, was created by the contracts and became a contractual right which continued to exist so long as the contracts remained in force."

B. The Plain Meaning of The CBA Illustrates Dues Check Off is Contractually Created.

The Union Security and Dues Check Off provisions in the CBA between Respondent and Charging Party provide, in part, "The Check-Off Agreement and system heretofore entered into and established by the Employer and the Union for check off of Union dues by voluntary authorization, as set forth in Exhibit 2, attached to and made a part of this Agreement, shall be continued in effect for the term of this Agreement." (Jt. Stip. Exh. 1 p. 4). The plain language clearly states the check off arrangement expires upon expiration of the CBA. In order to avoid applying the long established contractual doctrine of applying a plain meaning to language negotiated between parties the *Lincoln* Board would insist that plain language is not enough, at

least in the circumstance of dues check off, and a clear and unmistakable waiver is required. See *Lincoln Lutheran* at p. 9, fn. 28.

This is not the interpretation given to no-strike and no-lockout clauses. No-strike and no-lockout clauses fail to survive contract expiration, "in recognition of the statutory right to strike." *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 199 (1991). The clauses in the CBA between Respondent and Charging Party provide that there will be no strikes or lockouts "during the term of this Agreement." (Jt. Stip. Exh. 1, p. 36.) The language plainly has the same meaning as the language in the check off provision. After expiration the Union can strike, Hospital can lock out and Hospital can cancel check off.

C. The Economic Realities of Bargaining Demonstrate Dues Check Off is Contractually Created.

The issue the *Lincoln* Board refused to recognize is the economic realities of bargaining. The Trial Examiner in *Bethlehem* recognized the realities of bargaining and discussed those realities in his recommendation. The Trial Examiner wrote,

> While the Respondent has not conceded the point, it may well be that its very purpose in this action was expressly to exert a pressure upon the Union to accept the Company's demands and come to terms on that basis. I think this precise question has just recently been put to rest without equivocation by the Supreme Court decision in *NLRB v. Insurance Agent's International Union, AFL-CIO (Prudential Ins. Co.)*, 361 U.S. 477. ". . . at the present statutory stage of our National Labor Relations Policy, the two factors—necessity for good faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side . . . the use of economic pressure . . . is of itself not at all inconsistent with the duty to bargain in good faith." Indeed, the Court went on to conclude: ". . . the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining."

The *Lincoln* dissent recognized this as well. *"Also see NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 489 (1960) ('The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.'). Similar considerations apply to dues-checkoff clauses, consistent with the principle that 'an employer is not required to finance a strike against itself. . . .' *Texaco, Inc.*, 285 NLRB 241, 245 (1987)." *Lincoln*, 362 NLRB at 11.

D. In Right to Work States Unit Members Can't Revoke Dues Authorizations At Will and Are Bound to Contractual Terms of The Signed Authorization.

Recently in *Smith's Food & Drug Centers, Inc.*, 366 NLRB No. 138 (2018), the Board approved dismissal of a Complaint alleging the employer and union violated the NLRA by refusing to honor employee attempted revocations of dues authorizations following expiration of a CBA in Right to Work State Arizona. In doing so, the Board held that the 15 day windows between 45 days and 30 days prior to an anniversary date of the authorization and prior to expiration of the CBA did not violate the Act. The GC had argued that revocations occurring after the expiration and during the hiatus should have satisfied the requirements of the Act to revoke a valid authorization. The GC's argument was rejected. Further, the GC argued that resignations from union membership prior to expiration constituted a dues deduction authorization revocation upon expiration of the CBA. This argument was rejected by the Board. The Board limited the unit members' right to revoke authorization to the window periods in the authorization document. In other words, the Board held that unit members were bound by the plain meaning of the contractually binding authorization document.

In a decision rendered before *Smith's*, in *Local Joint Executive Board of Las Vegas v. NLRB*, 657 F.3d 865 (9th Cir 2011), the court refused to follow *Bethlehem Steel* in a case in which it had a split decision of the Board under consideration. There is no discussion and/or consideration

in the opinion regarding the Board's position on dues authorization revocation and in Respondent's view, the court appeared to understand revocation could occur at any time after expiration in a Right to Work State. Of course, this is simply not the Board's position and thus not the law. The Seventh and DC circuits have upheld the *Bethlehem Steel* decision in its decisions. *U.S. Can Co. v. NLRB*, 984 F.2d 864 (7th Cir. 1993), and *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997).

E. *Lincoln Lutheran* Forces a Contractual Term on Employers.

The Board lacks authority to compel a party to agree to a specific proposal including dues check off. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). In addition, statutory requirements governing dues check off and union-security clauses have been created to limit the transfer of funds from an employer to a labor organization. Federal criminal statute Section 302 of the Labor Management Relations Act, generally prohibits payments from an employer to a union. 29 U.S.C. Section 186. Section 302(c)(4) provides an express exception for dues to be withheld from an employee's pay and transferred to a union. To satisfy the statute two contractual arrangements must occur. First, the employer and union must agree to check off and second, the employee must execute a valid authorization. The entire process is contractually entered. The process likewise contractually ends.

A simple comparison demonstrates the failure of the *Lincoln Lutheran* Board to properly consider dues check off contractual. Compare dues check off, a no strike clause and employee wages. Upon expiration of a CBA, the union can call a strike. When an employee works after expiration of the CBA, the employee is paid wages just like prior to expiration. Common sense dictates dues check off is clearly the same as the right to strike. To require an employer to accept an indefinite dues check off provision is compelling a contractual term in violation of the Act.

V. CONCLUSION

The Complaint in this matter should be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 10, 2018, he served the foregoing **RESPONDENT'S BRIEF,** to following individuals by **Certified Mail – Return Receipt Requested and Electronic Mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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